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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. 463

JACK D. JOHNSON,

Petitioner,

—v.—

NOVA F. STUCKER, Superintendent of the Kansas State Industrial Reformatory,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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IN THE

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OCTOBER TERM, 1968

No. .....

JACK D. JOHNSON,

Petitioner,

—v.—

NOVA F. STUCKER, Superintendent of the Kansas State Industrial Reformatory,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kansas, entered in *Johnson* v. *Stucker,* on April 12, 1969.

Opinions Below

Petitioner was convicted of second-degree burglary and grand larceny in a state district court in Kansas in September, 1964, and sentenced to the Kansas State Industrial Reformatory.[1] On August 16, 1966, he was placed on parole by the Kansas State Parole Board and permitted to return to his home in Story City, Iowa. In June, 1967, petitioner was arrested in Iowa and returned to the reformatory. On

[1] The events and proceedings related in this paragraph occurred prior to the initiation of this suit in the Kansas courts. See R. 10, 11, 45, 56.

July 25, 1967, he was given a statement of charges of parole violation and an interview with the parole board. On July 26, 1967, he was informed by memorandum that his parole had been revoked. He is now a prisoner at the reformatory. The respondent is the superintendent of that institution. No record was made of the proceedings before the parole board.

On February 21, 1968, petitioner filed a petition for habeas corpus in the District Court of Reno County, Kansas (R. 3-5), which held an evidentiary hearing on February 29, 1968 (R. 28-34). That court denied the petition in a memorandum opinion filed March 4, 1969 (R. 10-14). It is unreported and appears in the Appendix, *infra,* p. 15a. The Kansas Supreme Court affirmed on April 12, 1969. 435 Pac. 2d 35. Its opinion is printed in the Appendix, *infra,* p. 1a.

Jurisdiction

The judgment of the Kansas Supreme Court was entered on April 12, 1969. Mr. Justice White granted an extension of time to and including August 10, 1969, within which to file this petition. Jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257.

Questions for Review

1. Is a paroled prisoner entitled to a due-process hearing in an action to return him to prison?

2. Is the respondent in a parole-revocation action entitled to the assistance of counsel?

3. May a state parole board revoke a prisoner's parole solely because he has been accused and acquitted of a new crime?

Constitutional Provisions Involved

Article V, Amendments to the Constitution of the United States (in part):

> No person shall . . . be subject for the same offence to be put twice in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law. . . .

Article VI, Amendments to the Constitution of the United States (in part):

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article XIV, Amendments to the Constitution of the United States (in part):

> No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

All three issues center in the interview which Johnson had with the Kansas State Parole Board on July 25, 1967 (R. 6, 30). He had been informed before that interview, and was informed orally at the interview, that the board proposed to revoke his parole on three grounds: (1) He had not kept regularly employed while on parole. (2) He had failed to cooperate with his parole officer in Iowa. (3) He had been found guilty by a jury of a crime in Iowa, although this verdict was then "set aside on a legal technicality" (R. 6). (The record is that the verdict in Iowa was set aside because of insufficient evidence. *Infra*, p. 7.)

Before the interview with the board, and at the beginning of it, Johnson asked that his attorney be allowed to appear and present evidence. This request was denied before the interview and denied again, orally, during the interview, and Johnson was told "to shut up about it" (R. 30-32).

The board then asked Johnson what his response to the charges was. Johnson denied the first two charges and admitted that he had been tried and acquitted of a new crime in Iowa (R. 31). The record shows no other evidence taken by the board, and no other testimony before it (R. 31-32), although the board later told Johnson's attorney that it had considered a letter he wrote the board, which letter is not in the record (R. 11).

Aside from this letter the only evidence before the parole board was whatever statement Johnson was allowed to make during the unreported board proceedings; the contents of his statement are suggested in his testimony in the state district court (R. 30-34). Johnson and two other

witnesses also testified, without contradiction, that: (1) Johnson had remained continuously employed throughout his period of parole; and (2) Johnson had maintained friendly, cooperative relations with his parole officer in Iowa; his parole officer did not know why he was being returned for parole violation and had not initiated the revocation (R. 29-34). Respondent offered no evidence in the state district court (R. 55). The evidence in the record therefore indicates, without dispute, that: (1) The board had no factual basis for believing that Johnson was not employed continuously in Iowa. (2) Johnson was in fact employed continuously in Iowa. (3) The board had no factual basis for believing that Johnson did not cooperate with his parole officer. (4) Johnson's parole officer had not initiated the revocation and did not support it.

The trial court and the Kansas Supreme Court adopted similar reasoning in ruling against petitioner, holding that there is no federal constitutional right to counsel in state parole-revocation proceedings, that the burden of proof was on petitioner, and that he had failed to meet it. As the Kansas Supreme Court put it, "Parole from confinement in a penal institution prior to serving all of an imposed sentence is a privilege, a matter of grace, and no constitutional right is involved." (App., *infra*, p. 7a.)

The federal questions were raised at all stages of the proceedings—in petitioner's writ of habeas corpus in the Kansas lower court (R. 4-5), and in petitioner's Statement of Points in the Kansas Supreme Court (R. 26-27).

Reasons for Granting the Writ

This case presents a federal question of substance not heretofore determined by this Court (the second issue), and it involves a state decision not in accord with applicable decisions of this Court (the first and third issues). The legal questions presented have also been argued and decided in the United States courts of appeal, and the decisions of the courts of appeal concerning them are in conflict.

1. *Is a paroled prisoner entitled to a due-process hearing in an action to return him to prison?*

The Kansas parole board did not make a record of its proceedings. The evidence in the record taken in the district court in Kansas is that the board met very briefly, took no evidence, kept no record of what it did, and refused to let Johnson respond to the charges or to have his attorney respond for him (R. 31-32). The parole board offered no evidence. The record therefore is that the board acted solely on the written allegations of violation it had itself prepared. It had no evidence, and the Kansas courts had none, to support these allegations. Johnson's own testimony is the only evidence in the record on the revocation hearing (pp. 11-12, 23, 27-28, Reno County District Court record, summarized at R. 29-34):[2]

[2] The transcript of the hearing in the county district court was not a part of the Kansas Supreme Court certified record but has been properly certified by the Clerk of the District Court of Reno County, Kansas and filed here along with the Kansas Supreme Court record.

[On direct examination]:

Q. . . . did you request that an attorney be with you at that hearing? A. . . . Yes, sir.

* * * * *

Q. And was I present . . . ? A. No, sir.

Q. Did you bring this up or was any statement made at the hearing about the request for counsel? A. Yes, sir.

* * * * *

They just said no, and told me to shut up about it.

Q. How many charges are listed on Exhibit A? A. Three.

Q. Are these the only charges that were placed against you . . . ? A. Yes, sir.

Q. Have you examined those charges? A. Yes, sir.

Q. Are they true in any respect? A. The first two aren't true, but the third one is.

Q. What is the third charge, Mr. Johnson? A. Found guilty by jury trial of breaking and entering, although verdict set aside on legal technicality.

* * * * *

[On cross examination]:

Q. . . . what was the legal technicality you were released on [in Iowa], if you know? A. Lack of evidence.

* * * * *

Q. Now, during . . . your hearing before the Parole Board, were you allowed to testify? A. In a sense, yes.

* * * * *

You are allowed to say certain things as long as it goes along with what they think, and if you deviate you are told to shut up "or we will go into another matter."

* * * * * *

I went before them and Mr. Jones read my . . . original sentence . . . and then Mr. Jones told me that I had been returned for violating my parole and then he read [the charges] to me and he asked me if I had anything to say about those charges and I said "Well, for the most part the first two are false," and at this point Mr. Stites said to Mr. Jones "Well, we have heard that before," and I said, "Well, my attorney has pertinent information to submit to you people and I would like to have him present," and he told me "This is a private hearing and we don't allow interference."

Q. . . . Did they have any report or read any report into the record from your parole officer? A. Read into the record?

Q. Yes, or confront you with anything? A. No, sir.

Q. They just said you failed to keep regularly employed and you failed to cooperate with the parole officer's efforts to assist you and you were found guilty of a crime although the verdict was set aside on a legal technicality. And you got up and denied this except the last one? A. Yes.

The Kansas Supreme Court held on this record that Johnson had not sustained the burden of proof on habeas corpus (R. 42-56). The only evidence to which that court referred was Johnson's reply on cross examination that

the first two charges were false "for the most part" (R. 55). That statement, the Kansas Court held, was sufficient to "show the weakness of his case" (R. 55). As to the first two charges, the Kansas Supreme Court held that it would affirm the negative finding of the trial judge "even though no refuting evidence was offered" (R. 56). On the third charge—relating to the acquittal in Iowa—the state court held that "the mere fact that a parolee is arrested, charged, found guilty, but eventually exonerated . . . may be strong indication that the parolee has lapsed in his ways . . ." (R. 56).

This procedure, as affirmed by the Kansas Supreme Court, deprived Johnson of all the elements of a due-process hearing, as Mr. Justice Rutledge (concurring) summarizing them in *In re Oliver*, 333 U. S. 257, 278-79 (1948):

> This aggregated authority denies to the accused not only the right to a public trial, but also those other basic protections secured by the Sixth Amendment, . . . the rights "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." It takes away the security against being twice put in jeopardy for the same offense and denies the equal protection of the laws by leaving to the committing functionary's sole discretion the scope and contents of the record on appeal.

It was these rights which Mr. Justice Black, speaking for the Court in that case, held to be "basic in our system of jurisprudence." 333 U. S. at 273. Johnson was not ac-

corded one of them; he was not even given a statement from the parole board of the grounds on which his parole was revoked.

Johnson had a federal constitutional right to know what evidence there was that he had violated his parole and to offer an explanation of it. *Bratton* v. *Chandler*, 260 U. S. 110 (1922); *Morgan* v. *United States*, 304 U. S. 1, 307 U. S. 183, 313 U. S. 409 (1938). He had a right to some record or statement of reasons which would demonstrate that the board acted with some factual support. *Garvey* v. *Freeman*, 397 F. 2d 600 (10th Cir. 1968); *Lewes Dairy* v. *Freeman*, 401 F. 2d 308 (3d Cir. 1968), cert. pending, No. 924, Oct. Term 1968; cf. *Dickinson* v. *United States*, 346 U. S. 389 (1953). These rights are essential to any sort of hearing in a free society, and particularly to hearings which result in the deprivation of personal liberty. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950). They have been required by this Court of state administrative agencies. *Barsky* v. *Board of Regents*, 347 U. S. 442 (1954); *Speiser* v. *Randall*, 357 U. S. 513 (1958), and, by other federal courts, of state parole boards. E.g., *United States ex rel. Vance* v. *Kenton*, 252 F. Supp. 344 (D. Conn. 1966).

The application of the Bill of Rights to state parole-board hearings is, however, a principle in need of clarification by this Court. There are at least two federal circuits which hold that the Constitution has virtually no application to parole-board hearings; see *Gonzales* v. *Patterson*, 370 F. 2d 94 (10th Cir. 1966); *Rose* v. *Haskins*, 388 F. 2d 91 (6th Cir. 1968), cert. den. 392 U. S. 946 (1968). Other federal courts of appeal, and some federal district courts and state courts, have held that the Bill of Rights protects ex-convicts. *U. S. ex rel. Frederick* v. *Kenton*,

308 F. 2d 258 (2d Cir. 1962); *Barnes* v. *Reed,* 301 F. 2d 516 (D. C. Cir. 1962); see *Fleming* v. *Tate,* 156 F. 2d 848 (D. C. Cir. 1946); see *Robbins* v. *Reed,* 269 F. 2d 242 (D. C. Cir. 1959); see *Boddie* v. *Wealdey,* 356 F. 2d 242 (4th Cir. 1966); *Hamrick* v. *Boles,* 231 F. Supp. 507 (N. D. W. Va. 1964); *U. S. ex rel. Obler* v. *Kenton,* 262 F. Supp. 205 (D. Conn. 1967); *U. S.* v. *Kenton,* 256 F. Supp. 296 (D. Conn. 1966); *Furnell* v. *State,* 206 So. 2d 23 (Fla. App. 1967). It is important for this Court to clarify the requirement of fundamental fairness in parole-board hearings. This aspect of life in a civilized society demands, as much as any other, the constitutional wisdom Mr. Justice Frankfurter (dissenting) expressed in *Solesbee* v. *Balkcom,* 339 U. S. 9, 25 (1950):

> The fact that a conclusion is reached in good conscience is no proof of its reliability. The validity of a conclusion depends largely on the mode by which it was reached.

2. *Is the respondent in a parole-revocation action entitled to the assistance of counsel?*

This Court held in *Mempa* v. *Rhay,* 389 U. S. 128 (1967), that the Sixth and Fourteenth Amendments require the assistance of counsel at probation-revocation hearings which involve the imposition of sentence. The Court's reasoning compels the conclusion that the same rule applies to parole revocation-hearings, but not all state and lower federal courts have read the opinion that way.

This Court's opinion in *Mempa* emphasizes the application of the Sixth Amendment whenever counsel will be of significant assistance to the prisoner, or whenever the absence of counsel would be a disadvantage to him. This

Court quoted its opinion in *Townsend* v. *Burke*, 334 U. S. 736, 741 (1948) (quoted at 389 U. S. 133):

> . . . counsel . . : could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner.

And it relied on its opinion in *Moore* v. *Michigan*, 355 U. S. 155, 160 (1957) (quoted at 389 U. S. 133):

> The right to counsel is not a right confined to representation during the trial on the merits.

Both these considerations are obviously important in reference to counsel for petitioner at his parole-revocation hearing, as are other references to the Sixth Amendment in the Court's *Mempa* opinion (389 U. S. 134):

> . . . appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.

This Court further emphasized that counsel could be of substantial aid in "marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant. . . ." (389 U. S. 135). And, as if to belie in advance the narrow reading the *Mempa* decision has been given by some state and lower federal courts, the Court said (at 389 U. S. 137):

> . . . a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing.

If, as this Court clearly indicated, counsel may appear in probation-revocation hearings, it follows that counsel may appear in parole-revocation hearings. The difference in a Sixth Amendment context is semantic.

But the *Mempa* decision has created a wide divergence of opinion among state courts of last resort, and among the lower federal courts, particularly in cases of the sort involved here, where the revocation of probation or parole is determined after sentence has been imposed. Some state courts of last resort have held that *Mempa* requires the appointment of counsel at all revocation hearings, whether or not the hearing might also involve sentencing, and whether or not the relevant sentence has already been imposed: *Gargan* v. *State,* 217 So. 2d 578, 579 (Fla. App. 1969) ("The state would have us draw a distinction between the one step procedure used by the State of Washington in *Mempa* and the instant two stage device in which an attorney was appointed to represent defendant at her sentencing. This contention must be rejected."); *Strickland* v. *Melton,* 165 S. E. 2d 90, 95-96 (W. Va. 1968): ("a criminal defendant . . . is entitled to the assistance of counsel at any hearing at which his probation is revoked. . . ."); (see the dissenting opinion at 165 S. E. 2d 90, 100); *State ex rel. Render* v. *Wood,* 165 S. E. 2d 102 (W. Va. 1968); See *People ex rel. Decker* v. *Martin,* 291 N. Y. S. 2d 408 (Sup. Ct. 1968).

Several other state courts of last resort have come to much the same conclusion—or have implied it—in dicta: *State* v. *Holiday,* 153 N. W. 2d 855 (Neb. 1967), modified 155 N. W. 2d 378, 379 (Neb. 1967) (". . . defendant was entitled to legal counsel at public expense in the hearing to revoke the order granting probation. . . ."); *State* v. *Riddell,* 449 P. 2d 97 (Wash. 1969); *State* v. *Seymour,* 237 A.

2d 900 (N. J. App. 1968); *Herrington* v. *State*, 207 So. 2d 323 (Fla. App. 1968). And others exhibit a good deal of internal confusion on the point: *Walker* v. *Langlois*, 243 A. 2d 733 (R. I. 1968); compare *People* v. *Lott*, 162 N. W. 2d 290 (Mich. App. 1968).

Several state courts have restricted the holding in *Mempa* to hearings which combine revocation and sentencing, some of them holding that *Mempa* has no bearing on parole-revocation: *Petition of DuBois*, 445 P. 2d 354, 361 (Nev. 1968) ("... the paramount factors ... in Mempa ... are not present ... where sentencing occurs prior to a determination regarding probation. ...."); *John* v. *State*, 160 N. W. 2d 37, 44 (N. Dak. 1968) ("... the Sixth Amendment right to counsel, when the sentence has been imposed, has not yet been applied to parole or probation revocation hearings."); *People* v. *Follette*, 295 N. Y. S. 2d 565 (Sup. Ct. 1968). And some state courts have apparently reached the same conclusion in dicta, or have implied it: *People* v. *Hernandez*, 166 N. W. 2d 58 (Mich. App. 1968); *State ex rel. Halverson* v. *Young*, 154 N. W. 2d 699 (Minn. 1967).

Lower federal courts are in a similar quandary—some of them holding or stating in dicta that *Mempa* requires counsel at revocation hearings: *Ashworth* v. *United States*, 391 F. 2d 245, 246 (6th Cir. 1968) ("In Mempa ... the Supreme Court held that counsel must be provided at revocation proceedings. ...."); See *Davis* v. *United States*, 288 F. Supp. 180 (W. D. Mo. 1968); *cf. Reed* v. *Butterworth*, 297 F. 2d 776 (D. C. Cir. 1961), and *Barnes* v. *Reed*, 301 F. 2d 516 (D. C. Cir. 1962). And others holding, stating, or implying, that *Mempa* must be limited to its facts—that coun-

sel is required only if the hearing is also for purposes of imposing sentence: *Sorenson* v. *Young,* 282 F. Supp. 1009, 1010 (D. Minn. 1968) (" . . . parole considerations follow . . . as a matter of the state's leniency, largesse and discretion . . ."); *Williams* v. *Patterson,* 389 F. 2d 374, 375 (10th Cir. 1968) ("Parole is a matter of grace."); *United States* v. *Brierly,* 288 F. Supp. 401 (E. D. Pa. 1968); *Sammons* v. *United States,* 285 F. Supp. 100, 101 (S. D. Tex. 1968) ("The situation in Mempa was essentially a deferred sentencing."); *Holder* v. *United States,* 285 F. Supp. 380 (E. D. Tex. 1968); *United States* v. *Hartsell,* 277 F. Supp. 993 (E. D. Tenn. 1967); *Lawson v. Coiner,* 291 F. Supp. 79 (N. D. W. Va. 1968); *Dunn* v. *California Department of Correction,* 401 F. 2d 340 (9th Cir. 1968).

Mempa did little more than extend *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), to every critical stage of the criminal process, including the stage at which a convicted, sentenced prisoner is deprived of his liberty on the charge that he has violated a condition of release. All of the considerations which lay behind the application of the Sixth Amendment to the peculiar facts of *Mempa* apply to the facts of this case.

It is possible to view a parole-revocation hearing as administrative rather than judicial, and benign rather than punitive. But neither distinction makes a Sixth Amendment difference. As the discussion under the first issue, above, indicated, the Bill of Rights applies to administrative hearings. And, as the Court emphasized in *In Re Gault,* 387 U. S. 1 (1967), the Bill of Rights applies even when the state's objectives are benign. In one view, the necessity of counsel follows because the benign hearing has a serious result—as Mr. Justice Black said (concurring) in *Gault* (387 U. S. 61):

> Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights. . . .

In another view, adherence to a constitutionally minimum guarantee of fairness serves the benign purposes of the administrative system, as the opinion for this Court in *Gault* emphasized (387 U. S. 20-21):

> . . . Justice Frankfurter has said: "The history of American freedom is, in no small measure, the history of procedure." But in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data.

The questions presented here are also of significant impact on the administration of criminal justice. Even though prisoners who have been denied counsel in parole-revocation hearings are disadvantaged in seeking judicial review of state administrative action, about 500 cases involving questions of administrative due process before parole boards have been reviewed in the courts in the past 21 years. See Kimball and Newman's Study, 14 Journal of Crime and Delinquency 1, 3 (1968), and Professor

Cohen's discussion at 47 Texas Law Review 1, 4 (1968). In Kansas alone about ninety-five per cent of all releases from prison are by parole; nationally, the average number of men annually living the half-life of parole, in 1965, was 172,625, and the number is growing. President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Corrections* 61 (1967).

These men today enjoy, as did the juvenile offender in *In re Gault,* 387 U. S. 1 (1967), the worst of two worlds. On parole they are told they must live successfully as free men in an open society. But they are told in the courts that they are not "free," but are living in an extension of the prison yard; the Constitution does not apply to them. They can be returned to prison with no more ceremony than the guard uses in sending prisoners to their cells after exercise. See Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View from Mempa v. Rhay,* 47 Texas Law Review 1, 6-7 (1968). Once back in prison they learn that while they were on parole they *were* free, for the time spent on parole does not count against the time to be served on their original sentence. See *Comment,* 39 Notre Dame Lawyer 715 (1964).

Petitioner's case is not an isolated aberration; it is typical of the present parole system. The best statistical estimates indicate that about twenty-five per cent[3] of the 172,000 men now in this status in the United States will lose their liberty in parole-revocation proceedings similar to, or even worse than, the proceeding in which petitioner was returned to prison. Cohen, *supra,* at 6-7.

The numbers of men situated as petitioner is itself demonstrates the substantial dimensions of the questions pre-

[3] President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Corrections* 62.

sented. The desirability of review in this Court is sharpened, however, by the fact that these men are a deprived, powerless, unpopular minority. They lack cohesion out of prison because they must eschew contact with other "criminal types" under the standard set of conditions on parole. They lack economic resources; they lack that element of attractiveness which will sometimes obtain relief for the disadvantaged; they have little or no chance to obtain a genuine hearing of their claim to basic constitutional rights before the agencies of government which regulate their lives in and out of prison. Cohen, *supra,* at p. 4:

> The deprivational status of "convicted" . . . has served as a powerful conceptual barrier against efforts to bring procedural safeguards and substantive rights to persons so denominated. When a desire to help—the present claim of corrections—is linked with the deprivational status, any complaints . . . tend to be viewed as base ingratitude—or worse.

Thoughtful commentators have characterized this area as one marked by administration without law, applying standards which if made visible and subjected to scrutiny would not pass public inspection. See ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 134-35 (1964). But when men in petitioner's class seek review of these standards and procedures in light of the Constitution, they receive the answer Mempa received from the Supreme Court of Washington, *Mempa* v. *Rhay,* 416 P. 2d 104, 110 (1966), *rev'd* 389 U. S. 128 (1967):

> No appeal, or a petition for a writ of habeas corpus, will be successful in this court where the question is whether the probationer was accorded his constitu-

> tional due process rights at the hearing. *He simply has none.* (Emphasis added.)

This is the standard view—that parolees hold their liberty below the reach of the Constitution; that petitioner and other members of his class have fallen so low that the deprivation of their liberty is beneath the reach of the Bill of Rights. No one will deny that petitioner and other men in his class are indeed ex-convicts—and they will carry that brand for the rest of their lives. But the Constitution does not admit of pariahs; it applies to this petitioner and men in his situation as much as it applies to the rest of us.

Necessary changes in the administration of justice have in fact been recognized by this Court and by others concerned with such problems. This Court recognized in *United States* v. *Wade,* 388 U. S. 218 (1967), that changes in the institutions which detect and adjudicate crime call for changes in the application of the right-to-counsel protection of the Sixth Amendment. The police line-up at issue in that case is a recent development. "When the Bill of Rights was adopted, there were no organized police forces as we know them today." 388 U. S. 224. What the Court there identified as "critical confrontations of the accused . . . at pretrial proceedings," *id.,* is today equally applicable to confrontations which occur between an ex-convict at liberty and parole officials, who seek to deny him his liberty; what the Court said in *Wade* is equally true of the post-release "critical stage" of criminal adjudication (388 U. S. 226):

> It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that

> he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.

The importance of counsel at parole-revocation hearings becomes more essential as expanding prison populations increase the number of parole-revocation hearings, or substitutes for them. The argument for summary, secret, often arbitrary administrative action is made for parole boards, but it is the same argument which was made for police line-ups in *Wade,* and juvenile hearings in *Gault*—the argument that they are benign. As a task force of the President's Commission on Crime pointed out:

> [I]t is inconsistent with our whole system of government to grant such uncontrolled power to any officials, particularly over the lives of persons. The fact that a person has been convicted of a crime should not mean that he has forfeited all rights to demand that he be fairly treated by officials.
>
> * * * * *
>
> [T]he fact that rehabilitation may be one aim of correctional treatment does not remove the need for legal controls. Justice Brandeis warned that "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."

The President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Corrections* 83 (1967).

Moreover, the task force specifically recommended:

> For some kinds of decisions, such as decisions to revoke probation or parole, offenders should be accorded the basic elements of due process, such as notice, representation by counsel, and opportunity to present evidence and to confront and cross-examine opposing witnesses. *Id.* at 84.

The parent commission found, as this Court found in *Wade*, that modern methods of detection and treatment may have created a need for counsel where none existed in the 18th Century:

> During the period when restraint was the dominant response to crime, there were only two major statuses to differentiate: In prison being punished and out of prison after having served a sentence. Concern for accurate factfinding and proceedural safeguards was therefore focused on adjudication.

President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 179 (1967).

The Commission pointed to three crucial particulars in parole decision-making, on each of which counsel is obviously critical to due process: (1) the availability of information essential to sound decisions; (2) the assurance that the information presented is relevant to the decision to be made; and (3) the refinement of information presented so that it does not overload the human capacity of the correctional decision-maker. *Ibid.* Petitioner's case illustrates the importance of counsel in assuring these ele-

ments as well as in protecting the accused from the apparent arbitrariness present in parole revocation hearings today.

3. *May a state parole board revoke a prisoner's parole solely because he has been accused and acquitted of a new crime?*

Petitioner was accused of three parole violations: (1) that he had failed to remain employed; (2) that he had not cooperated with his parole officer; and (3) that he had been found guilty by a jury of a new crime, but that the verdict had been set aside on what the parole board called a "legal technicality" (R. 6). The uncontroverted evidence before the Kansas district court was that the first two charges were false, *and* that no evidence was presented to the parole board to support them (R. 29, 32-34). The evidence was further uncontroverted that petitioner had been acquitted of the new crime in Iowa (R. 30). It is impossible to avoid the conclusion that the reason for parole revocation was the Iowa criminal trial, at which petitioner was found not guilty. There is, in fact, uncontroverted testimony that the prosecuting attorney in Iowa, having failed to convict Johnson in the criminal proceeding there, initiated the action to revoke his parole in Kansas (R. 34).

Petitioner's parole was revoked because he had been acquitted in the Iowa trial. The question for this Court is whether a parole-revocation proceeding can be used to deprive him of his liberty for an offense for which he has been acquitted. Petitioner's position is that the parole revocation constituted double jeopardy and deprived him of due process under the Fifth and Fourteenth Amendments. *Benton* v. *Maryland*, —— U. S. —— (June 23, 1969)

(U. S. 37 U. S. L. W. 4623); *Fong Foo* v. *United States*, 369 U. S. 141 (1962); *Green* v. *United States*, 355 U. S. 184 (1957).

CONCLUSION

There is no distinction, logically or historically, between a medieval despot whose motives were Godly and a modern committee whose motives are humane. The price a humane government must pay to a free society is the price stated in the Bill of Rights. The petition for a writ of certiorari should be granted, and this Court should reverse the judgment below and require that the Fifth and Sixth Amendments apply as fully to state parole boards as they apply to any governmental official who has it in his power to send a free man to prison.

Respectfully submitted,

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